No. 20,719

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a nonprofit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al.,
Appellees.

APPELLANTS' CLOSING BRIEF

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INTRODUCTION

At the close of oral argument, appellees-defendants (hereinafter "defendants") requested leave to file a supplemental brief discussing the applicability of the recent case of *Vaca v. Sipes,* ..... U.S. ....., 87 S. Ct. 903, 17 L.ed. 2d 842 (1967) to the case at bar. Leave was granted by the court and appellants-plaintiffs (hereinafter "plaintiffs") were granted 20 days in which to respond.

Defendants' Supplemental Brief fails in its entirety to meet the issues in this case. In their original briefs, defendants stated and discussed the facts almost

as though the Weir affidavit did not exist, and as if the findings of the California Unemployment Compensation Appeals Board and NLRB Trial Examiner (which corroborate many of the statements in the Weir affidavit) were not part of the record. In discussing the *Vaca* case, defendants have now compounded this major shortcoming of their original briefs by twisting the clear language of *Vaca* in such a manner as to make it appear that *Vaca* merely affirmed what they have urged all along in this proceeding, instead of being diametrically opposed to all of their arguments. Once again, they have attempted to obscure the issues in order to cover up the grave injustices which were carried out against plaintiffs.

Defendants have sought to attach significance to the granting or denial of certiorari by the Supreme Court in other cases and to briefs filed by attorneys for other parties in other cases. We shall not dignify this portion of defendants' contentions by speculating as to the reasons why the Supreme Court in its inherent wisdom chose not to review other cases. Defendants' reliance upon a *brief* filed by an attorney in support of their argument that the federal courts are without jurisdiction to adjudicate this case is unworthy of comment.

We shall attempt to deal, as summarily as possible, with the issues of this case which have been settled by *Vaca v. Sipes.* Where necessary, we shall also point out the manner in which defendants have changed their position in their endeavor to avoid the impact of the *Vaca* opinion.

I. JURISDICTION OVER THE FAIR REPRESENTATION CLAIMS.

The first two causes of action of the complaint are based upon the union's duty to fairly represent plaintiffs as their statutory collective bargaining representative and the employer's acquiescence in this wrongful conduct. Plaintiffs rely upon the rule of *Steele v. Louisville & N.R. Co.,* 323 U.S. 192 (1944).

Defendants urged in their original briefs that the conduct complained of by plaintiffs were arguably unfair labor practices within the exclusive jurisdiction of the National Labor Relations Board. Other than asserting the general rule of pre-emption set out by the *Garmon* rule *(San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 1959), defendants relied upon the specific authority of *Miranda Fuel Co.,* 140 N.L.R.B. 181, which held that it is an unfair labor practice to discharge an employee, or otherwise discriminate against him, on the basis of irrelevant, invidious, or unfair considerations. (Union Brief, p. 15; P.M.A. Brief, pp. 39-40.) The briefs of defendants omitted any mention of the fact that the Second Circuit refused to enforce *Miranda.* 326 F.2d 172. The Supplemental Brief filed jointly by defendants continues to argue that the alleged wrongful conduct are nothing but unfair labor practices within the exclusive jurisdiction of the Board, despite the recent Supreme Court case of *Vaca v. Sipes,* ..... U.S. ....., 87 S. Ct. 903, 17 L.ed. 2d 842 (1967). Defendants no longer make reference to *Miranda.*

Prior to *Vaca v. Sipes,* there was a great deal of confusion as to the enforceability of *Miranda.* The

doctrine had been rejected by two members of the Board: Chairman McCulloch, and Member Fanning. The Second Circuit decision became final, and therefore the doctrine was no longer binding in New York, Connecticut, and Vermont. The Board, however, refused to be swayed by the Second Circuit's opinion denying enforcement:

> "With due deference to the circuit court's opinion, we adhere to our previous decision until such time as the Supreme Court of the United States rules otherwise." *Local 1367, Int'l Longshoremen's Association,* 148 N.L.R.B. 897, 898, fn. 7.

On November 9, 1966 (after the complaint in the case at bar was dismissed and pending appeal to this court), the Fifth Circuit decided *Local No. 12, United Rubber, C., L. & P. Wkrs v. NLRB,* 368 F.2d 12. The court declined to concur with the reasoning of the Second Circuit and held that breach of the duty of fair representation constituted an unfair labor practice under section 8(b) (1) (A) of the Act, 29 U.S.C.A. §158 (b) (1) (A), 368 F.2d 19-24. The court recognized that where there was a breach of contract as well as breach of the duty of fair representation, the employee could invoke either the primary jurisdiction of the Board or proceed in the courts. *Id.* at 22. The Fifth Circuit also enforced a similar order in a companion case, *NLRB v. Local 1367, International Longshoremen's Association, AFL-CIO,* 368 F.2d 1010, despite the reservations of Judge Choate, who believed that the prefereable procedure would be to permit individuals to file suit to adjust their grievances.

The uncertainty as to the proper forum faced by plaintiffs in the case at bench is too clear to require extensive discussion. The only circuits to have occasion to rule on the *Miranda* doctrine have reached opposite conclusions. At the time of the deregistrations and filing of the case at bar only the Second Circuit's opinion denying enforcement was in effect. Yet defendants' contention is that plaintiffs and others similarly situated should be given the often impossible task of guessing which forum is the proper one. It is obvious that to leave them so aggrieved might well result in just claims going unresolved.

Plaintiffs did go to the Board as a matter of precaution on May 17, 1965, within six months of their attempt to exhaust the internal grievance machinery of the contract. The Acting Regional Director and the General Counsel of the Board held that plaintiffs were barred by the six month statute of limitations under §10(b), for more than six months had expired since the deregistrations by the Port Committee on June 17, 1963. Although the plaintiffs filed their charges with the Board within six months of the affirmance of their deregistrations by the Coast Committee, the General Counsel ruled that the Board had no statutory authority to extend the statute of limitations. (R. 499.) In other words, by attempting to exhaust the contractual grievance machinery as defendants contend they were required to do, plaintiffs were effectively barred from obtaining relief from the Board (assuming such relief was available).

Exclusive jurisdiction in the Board to adjudicate "fair representation" cases (if such exclusive jurisdiction ever in fact existed) was specifically rejected by the Supreme Court in *Vaca v. Sipes, supra.*

> "With the NLRB's adoption of *Miranda Fuel,* petitioners argue, the broad pre-emption doctrine defined in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, becomes applicable. For the reasons which follow, *we reject this argument.*" 87 S. Ct. 909, 17 L.ed. 2d 850. [Emphasis added.]

The *Vaca* opinion is broad and far reaching, and does not have the restricted application urged by defendants. The Court recognized that a Union, as exclusive bargaining representative, has a statutory duty to fairly represent all employees in the bargaining unit under both the Railway Labor Act and the NLRA. 87 S. Ct. 909-10, 17 L.ed. 2d 850. The court also recognized that the fair representation suits often require review of substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and its handling of the grievance machinery. The latter are matters not normally within the Board's unfair labor practice jurisdiction, and the court questioned whether or not the Board brings substantially greater expertise to bear on these problems than do the courts, for the courts have been engaged in this type of review since the decision of *Steele v. Louisville & Nashville R. Co.* in 1944. The Board decided *Miranda* in 1962, although §8(b) of the Act was enacted in 1947. 87 S. Ct.

910-12, 17 L.ed. 2d 850-53. Therefore, concluded the Court, there was no reason to assume that Congress intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative by enacting §8(b) in 1947. 87 S. Ct. 913, 17 L.ed. 2d 853.

> "A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation." 87 S. Ct. 912, 17 L.ed. 2d 852.

The language of the Court thus specifically rejects the reasons advanced by defendants in their original briefs for exclusive jurisdiction in the Board under the *Garmon* rule. (Union Brief, p. 12; PMA Brief, pp. 50-51.) We note that defendants now belatedly acknowledge that fair representation suits have historically been enforced by the courts and have only recently been enforced by the Board. (Defendants' Supplemental Brief, p. 21.) Defendants persist, however, in asserting that the instant case is one within the exclusive jurisdiction of the Board for reasons which are enigmatic.[1]

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[1]As we understand defendants, they contend that the sole exception to exclusive NLRB jurisdiction under the *Garmon* rule is an action for breach of contract under §301. But the exceptions to *Garmon* are neither technical nor narrow. Aside from the fair representation cases, we note that even prior to *Vaca v. Sipes*, pre-exemption under the *Garmon* rule did not make NLRB juris-

The logic of *Steele v. Louisville & N. R. Co.* arising under the Railway Labor Act, makes it clear that it applied equally to the L.M.R.A., for the duty was based upon the Union's statutory status as exclusive bargaining representative of all employees in the unit, be they Negroes as in *Steele* or Class "B" longshoremen as in the case at bar.[2] It is significant that when *Ford Motor Co. v. Huffman,* 345 U.S. 333 (1953) was argued in the Supreme Court, the NLRB filed a memorandum taking the position that the right to equal representation was not an unfair labor practice. It said that in view of the absence of affirmative legislative history, such an unfair labor practice could not be found implicit in §7 of the Act. Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 Colum. L. Rev. 563, 591, note 107 (1962). Apparently defendants believe that the Board's change of position in 1962 by adopting *Miranda* ousted the courts of jurisdiction. *Vaca v. Sipes* effectively disposes of this contention.

II. BREACH OF CONTRACT.

As we understand their Supplemental Brief, defendants argue that *Vaca* was concerned in part with a breach of the collective bargaining agreement; a

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diction exclusive as potential or arguable unfair labor practices actions based upon libel, violence, wrongful expulsion from union membership, and mass picketing. *Vaca v. Sipes,* 87 S. Ct. 911.

[2]Here, also, defendants attempt to obscure the facts by referring to the Union's good record on "racial" discrimination which is not involved in this case.

claim of breach of contract is essential to sustain jurisdiction; plaintiffs have not alleged breach of contract; therefore, *Vaca* does not permit the federal courts to adjudicate this case. Defendants have apparently misread *Vaca* and completely omitted to read the record in this case.

It is significant that defendants have not referred us to any specific language in the *Vaca* opinion which ties jurisdiction over a fair representation case to a contract violation. Indeed, the Court discussed the fair representation cases and denied the theory of exclusive NLRB jurisdiction separate and apart from considerations of contract. What the Court said with regard to any interrelation between the fair representation and contract cases was that one of the practical considerations which foreclose pre-emption of the former is that there is an intricate relationship between the duty of fair representation and the enforcement of collective bargaining agreements.

> "For the fact is that the question of whether a union has breached its duty of fair representation will in *many cases* be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract." 87 S. Ct. 913, 17 L. ed. 2d 854 (Emphasis added.)

There is nothing in the opinion which holds that a connection between these questions is *mandatory*. *Vaca* discussed all the fair representation cases that have been cited by the parties in the case at bar and rejected defendants' contentions of pre-exemption by the Board.

Defendants continue to argue, contrary to the record, that plaintiffs have not alleged a breach of contract. Plaintiffs have alleged that they were discharged from their employment without cause, that the purported justifications for the deregistrations (the "1963 Rules") were invalid, and have denied that they were guilty of the violations in any event. The various contract violations are spelled out in our Reply Brief, pp. 3-4, and in our Opening Brief, pp. 68-69.

Defendants apparently concede that the "1963 Rules" pursuant to which plaintiffs were deregistered, were never reduced to writing in violation of §22.1 of the contract. They attempt to justify this shortcoming (Supplemental Brief, p. 16) by referring this court to §17.851 which provides that more stringent rules and penalties are applicable to limited registered longshoremen (the "B" men) and that mutually agreed practices shall be applicable. There is nothing in §17 which states that modifications and amendments need not be in writing (although it is significant that defendants in their affidavits have referred to the "1963 Rules" as though they were quoting from a formal written document [R. 91 W.]). The location at the end of the contract of §22.1, specifically requiring all modifications to be in writing, would certainly apply to the "mutually agreed practices" of §17.851. If there was a practice which evolved over the years for modifying the contract for purposes other than the deregistration of plaintiffs, defendants failed to make such a showing in the district court.

We cannot refrain from commenting upon defendants' argument that §17.851 permits them to apply "more stringent rules and penalties" to "B" men by "mutually agreed practices" without necessity of executing a written modification of the basic contract (and applying "mutually agreed practices" ex post facto without prior notice or specification of misconduct as in the case at bench). Such a blanket assertion of uncontrolled discretion by defendants forms the very basis of this litigation. We do not believe that Congress intended to confer plenary power upon a statutory bargaining agent at the expense of a minority of the bargaining unit. Cf. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 199 (1944). The utter disregard for the well being of the minority by a party operating under the mandate of Congress demands the invocation of constitutional condemnation. *Id.* at 208, concurring opinion of Justice Murphy.

III. EXHAUSTION OF CONTRACTUAL REMEDIES.

In discussing *Vaca* on the exhaustion question, defendants have also drawn erroneous conclusions. *Vaca* acknowledges that the rule requiring exhaustion of contractual remedies applies to actions for breach of contract, 87 S. Ct. 913, 17 L. ed. 2d 854, but makes no mention of this requirement in the fair representation cases where the employer condones the union's discrimination and accepts its benefits. Under *Vaca,* the only relevancy of the union's unfair representation to the exhaustion issue is where the employer has

committed a wrongful discharge in breach of the agreement and the breach could be remedied through the grievance process if it were not for the union's breach of its duty of fair representation by not processing the grievance. The case at bench is more complex, for plaintiffs allege that the discharges or deregistrations themselves were the result of the union's breach of its statutory duty, as well as being contrary to the specific terms of the contract. In addition, the Weir affidavit makes clear that the union did not fairly represent plaintiffs before the Port Committee but, to the contrary, the union representatives acted as the moving parties to deregister plaintiffs.

Due to the failure of plaintiffs to completely exhaust their contractual grievance procedure by presenting their claims to the arbitrator, defendants argue that the court below was correct in dismissing the complaint. They acknowledge that *Vaca* excuses the exhaustion requirement where the union has absolute control of the grievance machinery and has used that control to prevent the processing of the grievance. (Supplemental Brief, p. 13.) Although such were the particular facts in *Vaca,* there is nothing in the opinion *requiring* such a showing to excuse exhaustion. The court adopted a flexible rule where the contractual remedies have been devised and are often controlled by the union and the employer (as in the case at bench) and recognized that they may well prove unsatisfactory or unworkable for the individual grievant. 87 S. Ct. 914, 17 L. ed. 2d 854. In the case

at bench, with the failure of defendants to provide a particularization of charges, to permit a fair hearing before the Port Committee, accompanied by excessive delays in processing the grievances, we submit that the contractual remedies were unsatisfactory and unworkable. See the summary of the deregistration and grievance process at pp. 10-17 of our opening brief.

A. Plaintiffs Were Excused from Exhausting Their Contractual Remedies Because of the Excessive Delay in Processing Their Grievances.

We have dealt extensively with the reasons that plaintiffs were not required to go to the Coast Arbitrator. (Opening Brief, pp. 70-87, Reply Brief, pp. 12-13.) We are reluctant to extend our discussion of this issue, but we are compelled to set the record straight as to the delay of defendants in processing plaintiffs' grievances. We do so only because defendants have sought to disregard the record in order to show their "good faith".

On June 17, 1963, plaintiffs were deregistered. On July 23, 1963, the deregistrations were affirmed by the Port Committee. On July 27, 1963, plaintiffs appealed their deregistrations to the Coast Committee. On April 14, 1964, the present litigation was commenced in the district court. On or about December 18, 1964, plaintiffs were notified that the Coast Committee had affirmed their deregistrations.

Despite the fact that plaintiffs waited 8¾ months from the time they *appealed* their deregistrations until filing their action in the district court, defendants argue that plaintiffs should have waited longer

before going to court. It should be noted that the decision of the Coast Committee was made known *eighteen months* after the deregistrations in June, 1963.

The Act contains no statute of limitations for the exhaustion of any contractual remedies, and a reasonable standard should be applied by the courts. In a related statute, Congress found that a workingman should not be required to wait more than four months to resolve his grievance before going to court. 29 U.S.C.A. §411(a)(4). Time is of the essence in these cases, for the possibility is always present that the union and employer will try to delay convening the grievance machinery in order to frustrate the complaining party.

But the possibility for such abuse was never more evident than in the case at bar. Defendants attempt to justify their delay as being "obviously necessary and reasonable" in order "to develop an adequate and reasonable record with regard to these grievances". (Supplemental Brief, p. 11.) But when defendants moved to dismiss the Complaint in the court below, one of the grounds advanced was that the claim was barred by laches and by the statute of limitations, §10(b) of the Act, 29 USCA §160(b), because more than six months had passed since the *deregistrations* in June, 1963, and the filing of the action. (R. 104-05.) Defendants have apparently manipulated the operation of the grievance machinery by delaying plaintiffs so that they will be barred from seeking an impartial adjudication in the courts. Defendants have

abandoned their contention that the "statute of limitations" operates as a bar in this court. By reason of their conduct, they should be estopped from invoking the arbitration provisions of the contract in defense of this action, if in fact such provisions apply.

CONCLUSION

Vaca v. Sipes makes it crystal clear that the district court had jurisdiction to hear the case at bar, and a reversal of this case is justified.

Dated, San Francisco, California,
May 25, 1967.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR BRUNWASSER.